BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2015-JP-996-SCT

MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE **APPELLANT**

vs.

DAVID SHOEMAKE **APPELLEE**

APPELLEE'S RULE 10(D) BRIEF IN OPPOSITION TO THE FINDINGS OF FACT AND RECOMMENDATION OF THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court of the State of Mississippi may evaluate possible disqualification or recusal.

I. Chancellor David Shoemake, *Appellee*

ii. William H. Jones, Esq.
Andrew J. Kilpatrick, Jr., Esq.
Counsel for Appellee

iii. Darlene D. Ballard, Esq.
Executive Director, Mississippi Commission on Judicial Performance

iv. Bonnie H. Menapace, Esq.
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Respectfully submitted,

David Shoemake

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REQUEST FOR ORAL ARGUMENT

COMES NOW David Shoemake, Appellee, and pursuant to MRAP 34(b) requests this Court grant oral argument in this matter and in support thereof would show as follows, to-wit;

As will be seen from Appellee's brief, the findings of fact and recommendations of the Mississippi Commission on Judicial Performance are, for all intents and purposes, a carbon copy of the Findings and Recommendations of the Committee, each of which are fundamentally flawed as to, among other things, the failure of the Commission to consider the uncontradicted testimony and evidence provided by Appellee as to the reasons behind his testimony at the Show Cause Hearing.

In addition, the underlying case involves, among other issues, construction of a home for a ward of a conservatorship. The judge assigned to the conservatorship was Joe Dale Walker who subsequently pled guilty to obstruction of justice and was disbarred. Appellee's involvement in the conservatorship was limited to issues related to construction of the home and it is important for the Court to fully understand the limited involvement of Appellee. It is anticipated that the Court will have additional questions regarding Appellee's involvement and it is important the Court have an opportunity to fully address any questions it may have not addressed clearly in this brief.

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Other Authority:

STATEMENT OF THE ISSUES

Pursuant to the instructions of presiding Alternate Committee Member, Roy Campbell, III, at the hearing of March 12, 2015, **there were just two (2) issues for consideration by the Committee** assigned to conduct the hearing:

- Did Appellee sign the orders identified in Count 1 of the second amended formal complaint under the circumstances that are alleged in that amended complaint; and
- At the time of the Appellee's testimony on November 1, 2013, at the show cause hearing concerning his signatures on those orders, did he know or should he have known that his testimony was deceptive and misleading. *See: Hearing Transcript at page 32, lines 4 -14; and page 251, lines 23-25.*

Appellee pursuant to MRAP 28(a)(3) assigns the following as his statement of issues:

1. The Committee and Commission erred in considering any issue other than the two issues identified by Alternate Committee Member Campbell at the hearing as set forth above.
2. Appellee Shoemake's testimony and that of his court administrator is uncontradicted testimony and has not been shown to be untrustworthy nor contradicted by positive testimony, and therefore must be taken as true.
3. With uncontradicted testimony surrounding Appellee Shoemake's testimony and evidence at the Show Cause Hearing, the Commission erred in finding by "clear and convincing" evidence of any misconduct on part of Appellee.
4. That petitions filed by McNulty were late or not filed timely, does not render the order entered in response to said petitions invalid and the Commission erred in concluding that the lack of filing a petition at the time of signing an order was prejudicial to the administration

of justice.

5. There is no inherent conflict of interest in serving as an attorney for a conservatorship or as the *Guardian Ad Litem* and to the extent the Commission could consider such in reaching its conclusions, the Commission was at error.

6. The Commission erred in failing to comply with its own policies, procedures and rules, failed to recognize any discovery requests or obligation, and engaged in conduct that intentionally misrepresented certain matters to Shoemake with respect to the existence and the filing of a complaint by Newsome, and by failing to require a sworn complaint to be filed for amendments or to waive by a two-thirds (⅔) vote the filing of a complaint against Shoemake on unrelated matters.

7. In failing to dismiss the complaint filed herein against Shoemake for breaches of confidentiality in violation of the Rules of the Commission.

STATEMENT OF THE CASE

This matter was heard before the Mississippi Commission on Judicial Performance ("Commission"). On June 30, 2015, the Commission filed its Commission Findings of Fact and Recommendation ("Findings of Fact") which, among other things, recommended that Appellee be removed from office. The events leading up to the issuance of the Findings of Fact are as follows.

On May 2, 2013, by Marilyn Newsome ("Newsome"), through her attorney Terrell Stubbs ("Stubbs"), filed an unsworn complaint with the Commission against Appellee. The complaint arises out of a case styled *In the Matter of the Conservatorship of Victoria Denise Newsome* being Cause No. 2010-0146 P2 (the "Conservatorship"). Newsome was originally appointed as conservator for the Conservatorship.

The complaint filed by Newsome was not served upon Appellee within ninety (90) days as required by RMCJP 5(c) nor was any notice provided to Appellee of its filing.

Sometime around the middle of August, 2013, and over three (3) months after the complaint was filed by Newsome, the Commission's investigator, Ralph Holiman ("Holiman"), contacted Appellee and requested that Appellee copy the court file on the "Clements Estate" stating that there was a complaint filed against Appellee on that case. Holiman advised Appellee that the Commission budget did not have enough funding for Holiman to drive down and meet with Appellee and asked that Appellee bring the Clements' court file to the Commission office.

Appellee complied with the request and produced the requested information on August 23, 2013, to then Commission Executive Director, John Toney ("Toney") and current Executive Director, Darlene Ballard ("Ballard"). Immediately upon producing the "Clements Estate" case file to Toney and Ballard, both Toney and Ballard exited the room and two (2) agents from the Department on Justice ("DOJ"), Federal Bureau of Investigation ("FBI"), entered the room and began to interrogate Appellee regarding the Conservatorship and, particularly, the involvement of then Chancellor Joe Dale Walker ("Walker"). The FBI advised Appellee that no petitions to support certain orders signed by Appellee had been filed in the Conservatorship and that he had been an accidental or unwitting participant. That he was not to contact Walker nor Attorney Keely McNulty ("McNulty") about the matter. Shoemake cooperated in this regard.

Following the interrogation of Appellee by the FBI, Toney, in the presence of Ballard, advised Appellee that no complaint had been filed against him related to the Conservatorship and Appellee had been an accidental or unwitting participant.

On October 11, 2013 (*Clerks Papers "CP" 2*), the Commission met and directed the filing

of a formal complaint against Appellee. On information and belief, at this same meeting, the Commission directed that a Show Cause Hearing be conducted pursuant to Rule 7 of the rules of the Commission and for Appellee to show cause as to why Appellee should not be suspended pending determination of the Formal Complaint. On information and belief, at this same meeting the Commission appointed a three (3) member committee comprised of Commission Member, Judge Jimmy Morton ("Commission Member Morton") and Alternate Commission Members Judge Robin Midcalf and Roy Campbell, III, ("Alternate Commission Member Campbell") to conduct the Show Cause Hearing with Judge Midcalf as the presiding judge.

Appellee was not made aware of the Newsome complaint until the show cause order was served upon him on or about October 17, 2013, commanding him to appear November 1, 2013

At the conclusion of the hearing, the committee elected not to recommend interim removal from office.

The Formal Complaint was amended two times after filing without authorization by the Commission.

The hearing on the Second Amended Formal Complaint was held on March 12, 2015, before Commission Member Morton and Alternate Commission Member Campbell[1] and on the remaining members of the Committee issued their Findings and Recommendations of the Committee ("Committee Findings") which recommended that Appellee be removed from office.

On June 12, 2015, the Commission considered the Committee Findings and adopted the Committee Findings as the recommendation of the Commission.

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[1] Alternate Commission Member Judge Robin Midcalf's term expired in December 2014 but she was not replaced. The panel continued to hear the matter with just two members, Campbell and Morton.

This matter is now before this Court for *de novo* review of the recommendations of the Commission.

STATEMENT OF UNCONTRADICTED FACTS

After 36 years of law practice, David Shoemake was elected Chancellor of the Thirteenth Chancery Court District in the Fall of 2010. He assumed his duties as a first term Chancellor in January of 2011.

On July 21, 2011, his Senior Chancery Court Judge, Joe Dale Walker (Walker"), signed an Order transferring to Shoemake a conservatorship matter regarding construction of a home for a wheelchair bound ward for the purpose of approving and acceptance of bids for the construction of home.*(RE 1)*. The conservatorship was styled *In the Matter of the Conservatorship of Victoria Denise Newsome* being cause number 2010-0146 P2 (the "Conservatorship") in the Chancery Court of Simpson County, Mississippi. Marilyn Newsome ("Newsome") was originally appointed as conservator for the Conservatorship, the ward of which was Newsome's daughter Victoria Newsome (the "Ward").

On July 22, 2011, Shoemake signed an Order approving a bid of $273,075.14 for the construction of the home.(*RE 2*) Despite the consternation and confusion of the Commission and Committee, $273,075.14 was the only amount requested in the petition seeking approval of the bid. However, it is uncontradicted that all of the bids were attached to the petition and the lowest bid for the project was $296,575.14. The attorney presenting the petition was McNulty who had failed to correct the petition after the low bidder had reviewed and corrected its original bid. *(RE 28, and 29)*. Any allegation that Shoemake improperly *increased* the bid is wrong.

It is undisputed of the five (5) Orders involved, this is the only Order (*RE 1*) of which

Shoemake had any independent memory at the Show Cause Hearing on November 1, 2013. He remembers Walker talking to him about examining the bids. *See Show Cause Hearing Transcript Ex. "4" pages 11, 12.*[2]

On July 28, 2011, Shoemake approved an order concerning the Construction Management Agreement that had been signed by Newsome. The agreement contained a $30,000.00 construction management fee as part of the contractor's bid.*(RE 3)* This Order makes reference to the limited purposes for which Judge Shoemake was to be involved and was filed August 2, 2011. Claims that Shoemake was improperly involved at this point simply belie the facts and correspondence. Shoemake, however, had no independent memory of approving this Order. In fact, it was Shoemake who brought **this Order** to the Show Cause Hearing, and to the attention of the Commission, having found it the night before. Its execution was not a part of the Formal Complaint authorized by the Commission to be filed against him. Any claim Shoemake intended to misrepresent or deceive at the Show Cause Hearing ignores the fact that it was Shoemake who brought this Order to the attention of the Commission. Just why Shoemake would bring this order to the attention of the Commission as a part of any intent to mislead or deceive has never been explained by the Commission.

On August 2, 2011, Shoemake signed an order transferring funds into the Conservatorship account to accommodate the construction of the home *(RE 5)*. The Order was filed August 9, 2011. The need for the order was explained to Shoemake by email from McNulty dated August 2, 2011, beginning at 10:20 AM with a proposed Order.*(RE 6)*.This Order was entirely consistent with having a home built and constructed, however two years later Shoemake had no memory of signing this

[2]It is unchallenged and uncontradicted throughout these proceedings that Shoemake did not remember signing the involved Orders two (2) years later. Chancery Court Judges can easily sign 25 to 50 Orders every day.

Order.

On the same day, August 2, 2011 at 3:20 PM, McNulty sent an email to Shoemake requesting that he disregard the proposed Order, that some changes were needed.*(RE 7)*.

Again, on August 2, 2011 at 3:59 PM, McNulty requested Shoemake approve the revised Order which was provided along with the email.*(RE 8)*. This proposed order contains the exact same language, but in an entirely different format from the Order signed by Shoemake on August 2, 2011. *(RE 9 and compare to RE 5*). Again, the language is exactly the same. At the Show Cause Hearing, Shoemake had every reason to doubt the validity of his signature upon this Order and especially since he had been mislead to believe that no petitions existed to support the orders.[3]

Again, on August 2, 2011, at 4:26 PM Shoemake emailed McNulty stating "Can I sign this? When does Judge Walker take this case back?"*(RE 10)*.

At 4:31 PM on August 2, 2011, McNulty responded indicating she knew Judge Walker wanted him to handle all matters relating to the bids/management contracts/*etc*. and that the proposed Order piggybacked on previous Orders. Walker's court administrator, Kim Brister ("Brister"), was aware of the Order as demonstrated by the email response from Brister, stating "SOUNDS GOOD!!!", written to McNulty at 4:17 PM August 2, 2011.*(RE 11 and 12)*.

Within just 7 minutes of the 4:26 PM August 2, 2011, email of Shoemake to McNulty ("Can I sign this"), McNulty emailed Shoemake back at 4:33 PM indicating "I just received the signed Order. Thank you.".*(RE 13)*. Shoemake has no memory of signing this Order. Just how McNulty

[3] Shoemake had been interviewed by FBI agents, and Executive Director John Toney and Assistant Director Darlene Ballard, and was told that none of the involved Orders were supported by Petitions requesting the relief set forth in the Orders. Shoemake throughout has been adamant that he does not do business that way; and he is correct.

received this unnecessarily re-typed Order, in a different format, signed by Shoemake, so quickly after he inquired regarding the need for his involvement is not understood. Regardless, these closely timed events, together with many other facts as set forth below, caused Shoemake to begin to doubt the genuineness of his signature upon the August 2, 2011, Order.*(RE 5)*. Claims that Shoemake intended to deceive or mislead the Commission or Committee flies in the face of the fact that it was Shoemake who brought this string of emails and order with him to the Show Cause Hearing. He was trying to reconstruct the events from the very limited information he had and was showing what he had discovered the night before the hearing.

On January 25, 2012, Shoemake signed an Order reimbursing the contractor for stolen materials from the construction site and for their increase in costs.(RE 15) Shoemake has no independent memory of signing this Order. Again he was told by Ballard that there was no petition nor evidence to support this Order; a blatant and intentional misrepresentation. *See (RE 15) with accompanying affidavit of the contractor and (RE 16), the Construction Management Agreement. Under the Construction Management Agreement,* the homeowner (the Conservatorship) was responsible for the loss of these stolen materials.[4]

Unknown to Shoemake, in January 2012, McNulty had become aware of the typographical error regarding the bid amount[5] and that there was not enough money to complete the construction

[4] Under the Construction Management Agreement, the builder could not be held liable (*RE 16*). Those who criticize Shoemake for signing this Order offer no alternative to getting the home completed. It should also be noted that there were no less than three other attorneys involved with transactions involving the conservatorship who were aware of the ongoing construction.

[5]The error in the correct bid amount was not caught by McNulty as evidenced by her other petitions and orders. *See: August 2, 2011, Order Transferring Funds, and January 28, 2011, Order Approving Construction Management Agreement*.

of the home, based upon the low bid figure placed of $273,075.14. By email, McNulty submitted to Walker a Petition to correct the typographical error and a proposed Order in January 2012.(*RE 17*, 9 pgs).[6]

Shoemake's testimony at the Show Cause Hearing was without the benefit of these documents plainly in possession and stamped "**Received**" by the Commission **at least eight (8) days prior to the Show Cause Hearing**. Shoemake's requests to Ballard for production of these were critical to Shoemake. He had only a narrow (basically 12 day) period of time to prepare for the Show Cause Hearing. As will be shown hereinafter, by use of Commission Rule 7 permitting a Show Cause Hearing to be scheduled almost immediately, any Mississippi judge charged with wrongdoing has no opportunity to conduct any meaningful discovery, even though the Commission has adopted the Mississippi Rules of Civil Procedure ("MRCP"). *See: Rules of the Mississippi Commission on Judicial Performance ("RMCJP")* 8.B.

Regardless, it appears that Shoemake did approve an Order on March 26, 2012, correcting the typographical error and approving the actual low bid of $296,575.14.[7] *See: RE 18.* He did not sign that Order as it appears with the notations and markings that appear on the first and second page. Although dated March 26, 2012, it is marked "Filed" March 26, 2012 by "JDW" on the first page. It is marked *nunc pro tunc* to August 2, 2011. If McNulty was in Shoemake's court on March 26, 2012, and she needed the Order marked "Filed" why was Shoemake not requested to do that

[6] These documents were received by the Mississippi Commission on Judicial Performance **October 23, 2013**, eight (8) days before the scheduled Show Cause Hearing, but were not provided to Judge Shoemake even though he had made two (2) requests for them. See Ex. 11.

[7] Contrary to the representations of Ballard and Toney, there was a Petition requesting the correction. *See: RE 29.*

instead of "JDW"? Shoemake did not remember signing this Order when questioned at the Show Cause Hearing. Without the benefit of the documents received by Ballard on October 23, 2013, *(RE 17*), and the misrepresentations regarding the lack of petitions upon which Shoemake was absolutely entitled to rely, Shoemake plainly and squarely was entitled to question the authenticity of his signature upon that Order. Claims that he had "increased a bid" are inaccurate.[8] Further affecting the perception of Shoemake at the Show Cause Hearing was the fact that prior to the Order of March 26, 2012, the Court file reflected that McNulty on March 20, 2012 had filed a Motion to Withdraw (*RE 21*). Surely, something was wrong with these Orders.

Prior to March 2, 2012, and unknown to Shoemake, a conflict had developed between McNulty and Newsome *See: RE 19.* Without notice to Shoemake, McNulty had filed three (3) motions to withdraw as attorney for Newsome and/or the conservatorship *See: RE 20, 21 and 22*[9]

On March 14, 2012, Terrell Stubbs ("Stubbs") entered his appearance in the matter as attorney on behalf of Newsome as Conservator. *See: RE 23.* Stubbs' Certificate of Service does not show that any notice for this entry of appearance was given to Shoemake.[10]

Almost a year later, on May 3, 2013, with the assistance of Stubbs, Newsome filed her Complaint against Shoemake. *See RE 23.* The Complaint by Newsome contained, among other things, wild allegations and assertions that Walker and Shoemake had hired McNulty as a law clerk

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[8] The Petition for correction of the typographical error was not filed until April 24, 2012, but there was indeed a Petition given to Shoemake to support the request. *See RE 17.*

[9] McNulty was not actually relieved of her duties as attorney for the Conservatorship until May 8, 2012. *See RE 24.*

[10] Shoemake had twice issued MRCP 11 Sanctions against Stubbs. *See: Sullivan and Terrell Stubbs v. Maddox* 122 So.3d 75. *Sullivan et. ux. v. Maddox*, Simpson County Chancery Court Cause No. 2010-0133-P1.

to protect her and that they had worked together to try to back-file court orders and petitions *nunc pro tunc*, *etc*. Shoemake was not notified of the May 3, 2013, complaint by Newsome until October 17, 2013, (158 days later) when he was served with a copy of the Show Cause Order.[11]

On August 19, 2013, Shoemake received a telephone call from Commission Investigator Joe Holiman ("Holiman") to discuss a complaint on a case totally unrelated to the Conservatorship. Holiman mentioned that due to budgetary constraints, he was requesting Shoemake go to the clerk's office, copy the unrelated file and bring it to Jackson for him. This was a ruse perpetrated upon a sitting Mississippi judge. It was a farce designed to have Shoemake drive to Jackson, Mississippi, at his expense, for interviews that fairly obligated Commission attorneys to advise him of his right to counsel.

Totally unaware of the true reason for the request, Shoemake complied with the request and produced the requested information on August 23, 2013, to Toney and Ballard. Immediately upon producing the unrelated case file to Toney and Ballard, both Toney and Ballard exited the room and two (2) agents from the Department on Justice ("DOJ"), Federal Bureau of Investigation ("FBI"), entered the room and began to interrogate Respondent regarding the Conservatorship and, particularly, the involvement of Walker.[12] Shoemake was told by the FBI investigators that he was an unwitting accomplice and had done nothing wrong. They advised he was not a target of their

[11]Shoemake had been misled. If the Orders signed by him were not supported by Petitions he knew they were inaccurate. Upon receipt of the RMCJP 7 Show Cause Order, Shoemake had been trapped. He had no way to defend himself, and within the fourteen (14) days allowed, had no opportunity to conduct any meaningful discovery as allowed by RMCJP 8.B., that permits discovery pursuant to the Mississippi Rules of Civil Procedure.

[12] Shoemake had no further contact by these investigators following this meeting. That Shoemake might have wanted to have assistance of counsel on this trip was totally ignored by the Commission investigator and Commission attorneys. This effort can fairly be described as nothing more or less than an ambush.

investigation. He was thereafter interviewed by Toney and Ballard regarding the Newsome matter. They together with the FBI agents informed Shoemake he was not to contact Walker, McNulty, or Walker's court administrator about the investigation. He was told the involved Orders were not supported by any Petitions requesting the relief. Shoemake related to those present that except for the Order approving the low bid, he had no memory of signing the other Orders. Honoring the request to avoid contact with Walker, McNulty or the court administrator, Shoemake felt he was cooperating with an *investigation*.

Incredulously, and just as important, Shoemake was told by Toney and Ballard that **no complaint** had been filed against him related to the Conservatorship; **a fact that both Toney and Ballard knew to be untrue**.

On October 21, 2013, four (4) days after being served, counsel for Shoemake requested Ballard produce a copy of all supporting documentation and investigative materials. It was pointed out that the Complaint filed against Shoemake did not provide any detailed information at all. *See: Ex.11, p.1-2*. Ballard ignored this request and any discovery obligation replying only by email at 7:52 p.m. that the Commission was relying upon the "court records". Ballard acknowledged that investigator Holiman had been involved and that she was the "Prosecuting Attorney". *See: Ex. 11, pg.3.*[13]

On October 22, 2013, counsel for Shoemake again contacted Ballard in an attempt to obtain documents: "Again I need to know if you are going to produce any of the requested documents, particularly any statements from Mr. Teeter, Ms. McNulty, Joe Dale Walker, etc.?" *See: Ex. 11, Pg.*

[13] Reiterating, on October 23, 2013 Ballard had received (*RE 17*) 9 pages of documents that would have been greatly beneficial to Shoemake in refreshing his memory as to the long past events.

4. **Ballard produced nothing**. On that date, Ballard had in her possession two (2) reports (*Ex. "11"*) of Investigator Holiman dated July 30 and October 22, 2013, but they were not produced.[14]

On October 30, 2013, a day before the scheduled hearing, Shoemake, along with Ballard, learned that McNulty would be pleading the Fifth Amendment to her involvement regarding these matters; and she did. *See Ex. "4", p. 90-98.*

Shoemake appeared pursuant to a subpoena issued by Ballard in the Walker proceeding on Thursday, October 31, 2013. That day the hearing regarding Walker was underway and while waiting in the hallway, Ballard produced to Shoemake's attorney **one (1) email** from McNulty to Shoemake dated August 1, 2011. *See: RE* 26 and *SCH Transcript, Ex. 13*. This was the Commission's only production of any documents unto Shoemake prior to the Show Cause Hearing.[15] With this email, during the evening Shoemake was able to retrieve a string of emails from McNulty dated August 2, 2011, that discussed the need for the August 2, 2011, Order. *See RE 6, 7, 8, 10, 11, 12, 13*. Likewise during the course of that evening, Shoemake was able to retrieve his court calendars for the dates the respective Orders were signed. *See: RE 27.* McNulty's name does not appear upon

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[14] The last two paragraphs of the second page of the October 22, 2013, Holiman report explained McNulty's position regarding the need to correct the bid amount and how it occurred together with her version of her conversation with Shoemake concerning the need to change the amount of the bid. Having no independent memory of signing most of these Orders, this information would have been of enormous benefit to Shoemake. Ballard recognized no discovery obligation to Shoemake and intentionally to withhold this information.

[15] This is a fact. See Ex. 14, Letter from Shoemake's attorney to Ballard dated November 15, 2013, two (2) weeks after the Show Cause Hearing. "I had previously requested that you produce all documents you had gathered during this investigation but you have produced only one (1) email from Keeley McNulty." This is confirmed further by the comments of Ballard at the Show Cause Hearing November 1, 2013. *See Ex. "4", p. 25, 27, 28, 33.* Despite numerous requests for production of documents during the interim, Commission attorneys can prove the production of no other documents unto Shoemake's attorney prior to August 29, 2014. See Ex." 1". Other documents were produced on October 31, 2014 and November 19, 2014, Ex. " 2" and Ex. "3".

his calendar for any of those dates.[16] At the Show Cause Hearing, Shoemake fairly and quite reasonably had every reason to question the validity of his signature upon the proposed Orders. This would be particularly true in view of the fact the lawyer who *prepared* and *presented* those same Orders asserted, her privilege against self incrimination with regard to her preparation and handling of those Orders.

Immediately before the Show Cause Hearing, Shoemake, and Commission attorneys learned McNulty intended to plead the Fifth Amendment with regard to her involvement in matters concerning the Conservatorship.[17]

While waiting at Commission Offices for this Hearing to begin on October 31, 2013, Ballard produced a one (1) page email document to Shoemake's attorney. *See:* RE 26. Just how Shoemake was to make any benefit of this one (1) document on the day of his scheduled hearing is not quite known. However the Walker hearing ran long and Shoemake was instructed to return the next day, November 1, 2013. During the evening, with the document given by Ballard, Shoemake's secretary was able to retrieve a two (2) year old email thread from McNulty to Shoemake, all of which he brought with him to the Show Cause Hearing, as exhibits. *See:* RE 6, 7, 8, 10, 11, 12, 13. The signed Order is RE 5, and the otherwise perfectly prepared Order by McNulty, reading exactly the same is RE 9. It is inconceivable that Shoemake's act of bringing this email thread to the hearing could be

[16]This does not mean she could not have appeared *ex parte* which is probably the case. Notwithstanding, the calendars did not confirm the appearance of McNulty in Shoemake's court on the dates in question causing Shoemake to further question what was going on. Further, following the Show Cause Hearing, Shoemake learned that certain of the petitions were submitted by e-mail, a fact known to Ballard at the Show Cause Hearing.

[17] McNulty did not plead the Fifth Amendment with regard to factual matters such as whether or not she was given a job by Shoemake to keep her quiet, or whether she had ever performed any work as a law clerk for him, etc. *See Ex. "4", p. 90-98.*

interpreted as an attempt to mislead or be deceitful toward the Commission or Committee.

Regardless, Shoemake plainly felt something was amiss since he did not sign the Order presented by McNulty with his signature in the middle of the second page (*RE 9*) but somehow prepared and re-typed the Order he did sign (*RE 5*), within the very limited time period allowed by the email thread (within 7 minutes of him asking "Can I sign this Order?") *See: RE 10 at 4:26 PM.* Regardless this email thread plainly details that Walker did know that Shoemake had been asked and his court administrator, Brister, plainly confirmed that it was OK for Shoemake to be further involved *See: RE 11, 12*.

Shoemake adamantly testified repeatedly, that he does not sign orders without proper petitions. Stated differently, if presented with an order based upon the premise that he signed it without a petition being filed, Shoemake was fully justified in stating that he did not sign that order. Accordingly at the Commission hearings held on November 1, 2013, and March 12, 2015, Shoemake simply did not admit the validity of his signature upon any order submitted without a petition.

Central and primary to the understanding of Judge Shoemake's testimony at both hearings is the undisputed fact that he had been told (and that it was indeed the Commission's position) he had signed Orders without petitions requesting the relief.[18] Shoemake however adamantly testified and repeatedly so, that he does not sign Orders without proper petitions. Stated differently, if presented with an Order the premise of which the relief was granted without a petition being filed, Shoemake was fully justified in stating "I did not sign that Order". Accordingly, at the Show Cause Hearing he responded to questions about Orders for which he was accused of signing without

[18]What petitions appeared in the court file relative to the orders, were filed after the date of the orders. To Commission attorneys this confirmed Shoemake did not have a petition at the time he signed the Orders. To Shoemake this confirmed that someone was improperly placing his signature upon Orders.

petitions, Judge Shoemake repeatedly stated: "I do not practice law or be a judge this way. I do not sign orders without petitions. And I don't sign them unless the petitions are done right." *Ex. "4", p.45*. Shoemake further stated "I do not do business that way. I just do not do business that way as a judge." *Ex. "4", p. 45.*

With regard to the Order reimbursing for stolen materials (*RE 15*) Shoemake testified "I would have had to have some kind of police report or sheriff's report or something on materials. And then I would have to have something to show that the ward was responsible." And he did. *See Petition RE 15*, with attachments.

At the Show Cause Hearing, Shoemake was being questioned on matters that had occurred two years earlier. It is undisputed that his testimony and response to questions were based upon the following undisputed facts:

- Shoemake was advised by Ballard that the Orders were not supported by Petitions requesting the relief set forth in the Orders and Shoemake had no reason to question Ballard's representations.[19] *(Hearing Transcript of March 12, 2015 [**"T"**] p. 193,198*)
- That McNulty, the attorney who had prepared and presented each and every one of the Orders, did indeed intend to claim her right against self-incrimination relative to her handling of the Orders.(*T. 90-98*)
- That the Order of August 2nd transferring funds for the construction of the home apparently had been re-typed using different fonts with his signature at the top of the page (*RE 5*) although McNulty had provided the same order using the exact same words

[19] The court file reflected in November 2013 that there were indeed Petitions filed but were all filed late or out of time.

with his signature at the bottom of a paragraph on the second page and in different fonts (RE 9) and she claimed to have received it within seven (7) minutes of his inquiry as to whether or not he should sign the Order. (*RE 10*) (*Ex. "4"*, *p. 34-40*)

- That McNulty had filed a Motion to Withdraw (*RE 21*) before she had submitted the March 26, 2012 (*RE 18*) Order.[20]

At the Show Cause Hearing Shoemake plainly and repeatedly qualified his answers with regard to whether or not his signature appeared upon the involved Orders. He stated in response to the inquiries:

a. "I don't have a handwriting expert . . ." (*Ex. "4"* p.76).

b. "In 2-plus years later ... I can't tell you."(*Ex. "4"* p.11)

c. "I can't remember that detail that far back ..."(*Ex. "4"* p.14)

d. "Looks like my signature ..."(*Ex. "4"* p.75, 77)

e. "Only thing I can figure out ..."(*Ex. "4"* p. 45,50,51)

f. "It looks like my signature, but I don't think it is ..."(*Ex. "4"* p. 30)

g. "**With what I know now** (with two weeks to prepare for the Show Cause Hearing), **I've got to say those aren't my signatures**"(*Ex. "4"* p. 52)

Shoemake had been rushed to hearing with very little time to prepare, and with Ballard ignoring any requests for production of documents.[21] It was not until the Walker transcript and exhibits were filed with the Supreme Court was it discovered that McNulty had been instructed to

[20] At that point in time, McNulty had not been allowed to withdraw.

[21] Shoemake concedes factually he made some mistakes. Regardless Commission attorneys repetitious use of snippets of his testimony simply ignore what he did say.

tell Teater to review his bid. It was McNulty however who continued to use the initial low bid of Teater in her petitions and pleadings in the amount of $273,075.14 that confounded the matter. Shoemake's requests for documentation or investigative materials were ignored. It was Shoemake's review of the Walker transcript and exhibits that began to shed some light on what had occurred.

The Committee's finding with regard to the Show Cause Hearing is dated November 13, 2013. (*CP 49-55*). The Commission did not recommend the suspension of Judge Shoemake. These findings however repeatedly indicated the Conservator did not file petitions requesting the relief for the Orders[22] and that McNulty refused to answer and pled her protection under the Fifth Amendment to the U.S. Constitution relative to her involvement with the Orders. There was no testimony solicited from McNulty to rebut the assertions of Shoemake bringing the Commission unable to prove the allegations against him by clear and convincing evidence. *See CP 49-55.*

The Commission's findings were not filed with the Commission until November 19, 2013. However **before the findings were filed** and on the same day the Order was approved, November 13, 2013, the Law Office of Terrell Stubbs, Esq., forwarded to Ballard via facsimile three (3) sample orders for the purpose of comparing Shoemakes signatures on the provided Orders to those in the Newsome Conservatorship matter. ". . . you will find that they are the same signatures." *RE 30.*[23]

On January 23, 2014 the Magee Courier/Simpson County News published an editorial disclosing that Ballard had employed an expert witness to review Shoemake's signatures. This led

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[22]Commission Findings were referring to the fact Newsome had not signed the Petitions requesting relief, not that the Petitions did not exist.

[23] This document was not produced by Ballard or Commission attorneys until it was found in 1377 pages of documents produced by Commission attorneys on August 29, 2014. *See Ex. "1" using Adobe it is pg. 397.*

to the filing of Shoemake's Second Motion to Dismiss for breach of confidentiality filed February 18, 2014. *(CP 67).* A copy of the editorial is attached to the Motion to Dismiss as Ex. "1".

On January 15, 2014, an attempt was made to depose Newsome with regard to her allegations that Shoemake had conspired with Walker to explain what evidence she had that Judge Shoemake worked with Walker to produce Orders and later put them in the file. When Stubbs appeared at this deposition (*RE 34*), he basically shut down the deposition maintaining Newsome's answers to the questions were protected by the attorney/client privilege, and/or work product. *See RE 34, pgs. 17-23.*

On February 18, 2014, Shoemake filed his Second Motion to Dismiss based upon breach of confidentiality and refusal of Newsome to answer questions at her deposition. (*CP 67-152*). On that date February 18, 2014, Shoemake filed his Amended Answer to the Formal Complaint (*CP 153*) admitting after having opportunity to review additional documents and transcript from the proceedings, and making specific reference to the Walker transcript and proceedings held October 31, 2013, the signatures on the prospective orders were his, but because each and every Order served a valid and legitimate purpose, Shoemake denied any wrongdoing.[24] *See also "Ex.10-A and 10-B, Responses of Shoemake to Requests for Admissions in April 2014."*

On June 27, 2014, the Commission filed a Motion to Amend its Complaint against Shoemake (*CP 389*) to include a pertinent Order signed by Shoemake that was not included in the Formal Complaint. This is the Order that was brought to the attention of the Commission by Shoemake.*(RE*

[24]On February 5, 2014, Shoemake's attorney had written Ballard a letter explaining that additionally, Shoemake's Court Administrator had located the actual bid that indeed totaled $296,575.14. An explanation was given with regard to each and every order justifying the relief granted. Claim that Shoemake "confessed" is an exaggeration simply calculated to disparage Shoemake.

3) Then, without complying with Commission Rule 5, Commission attorneys sought to sanction Shoemake for testifying under oath that he had not signed orders and his testimony was deceptive and misleading. This Motion was noticed and heard before the same panel who would have ostensibly been the *victims* of the alleged misrepresentation and deceit. This Motion contains charges made against Shoemake without the charges being authorized and approved by the full Commission and violates the provisions of Commission Rule 5.[25]

On July 11, 2014, Shoemake filed his Objection and Response to the Motion to Amend the Formal Complaint proposed by Ballard (*CP 417-423*).

On April 15, 2014, Shoemake filed his Amended Second Motion to Dismiss complaining that in recent days the investigator of the Commission had been personally calling upon and visiting the Chancery Clerks in offices within his Judicial District and discussing his investigation of Judge Shoemake with Deputy Clerks. He had requested information from Court Reporters and served subpoena's regarding his "investigation" of Shoemake. The investigator had contacted local attorneys who practiced regularly before Shoemake regarding the investigation. Shoemake alleged in his Amended Second Motion to Dismiss that Ballard in response to discovery had admitted Stubbs was neither a complainant nor witness in the matter but that she had contacted him by telephone regarding the need for his client to testify and updates. *(CP 223-224)* Dismissal was further requested again because of Newsome's refusal to answer questions at her deposition. (*CP 225-233*).

[25]There was no sworn Complaint that was approved by the Commission to make these new additional charges that were then to be heard by only two Alternate Commission Members. It is submitted these very important charges sought to be made against a sitting Mississippi Judge should have been considered by the full Commission. Shoemake's testimony such as "With what I know now, I've got to say those aren't my signatures.", and Shoemake's own disclosure of a suspect order (*RE 15*) was never disclosed to the full Commission.

Shoemake's motions to dismiss were all overruled and the Commission's motion to amend its complaint was granted. (*CP 468*). The Commission was permitted again to amend its Complaint (*CP 501*). Shoemake filed his Answers and Defenses to the Second Amended Complaint of the Commission on December 3, 2014.

The matter proceeded to hearing on March 12, 2015, before the same panel who heard the motions claiming Shoemake had committed misleading and deceitful testimony before them. The same two panel Members then sat in judgment and as shown hereinafter Alternate Panel Member Campbell actually became prosecutor. *See Hearing Transcript ("T.") of March 12, 2015 (pp. 318, 324-326, 333,338-340*). [26]

At the hearing the Commission called Richard Courtney, Esq. ("Courtney"), an attorney to testify regarding his interpretation of certain Chancery Court rules and procedures. The interpretation of these rules and procedures is addressed in Shoemake's Brief in Chief. Courtney was forced to admit that he too, even though an expert, had prepared and presented petitions to expend conservator funds without notice to Newsome, the Conservator, and without her signature. (*See RE 31, Petition of Courtney filed September 15, 2011, and Petition of Courtney, RE 32, filed February 16, 2012*). The Commission's own expert witness had to concede he had done exactly what McNulty had done and that was file Petitions as a fiduciary, without the Conservator's signature, or in Courtney's place, without even notifying Newsome. *See T. 101-102.*

Next the Commission called Newsome as a witness. In response to a question regarding

[26] Amazingly, Campbell did not appear to be informed as to exactly what the issues were to be tried by him. *See T. 31-32.* Shoemake had already admitted signing the Orders in February. *See also Ex's. "10-A" "10-B", and "13*". Campbell's mind was already made up. He even announced there would be no need for opening statements (*T. 33*). It is submitted as judge and prosecutor, Campbell was not going to lose in this case.

"Who was your lawyer?", Newsome plainly stated Ms. Keely, referring to McNulty (*T. 126*). Newsome amazingly testified she did not know anything about anything although the home was constructed outside of the front door of the trailer she was living in. This testimony flies in the face of billing sheets and records of McNulty (*RE 33)*.[27]

When asked if she ever said anything like (wanting a home built) to Walker she said "I can't remember." This answer also flies in the face of her sworn testimony. See Ex. "8", pg. 50, January 12, 2011 Hearing Transcript before Judge Joe Dale Walker.(*T. 131-132*).

When asked if Newsome ever complained about the work of McNulty before Walker threatened to put her out of the home her answers in response were entirely evasive. *See T. 141-142.* Newsome appeared at the hearing in this matter with her attorney Terrell Stubbs. She even commented that she would not want to perjure herself about whether she ever complained before Walker threatened to put her out of the home for smoking. Her testimony is completely evasive, and not until she was pushed to answer the question did she admit that she had never complained about anything McNulty had done. *See T. 139-142.*

Shoemake testified at the hearing on the merits. His direct examination began with questioning by the Commission Attorneys at *T. 158.* The examination by Shoemake's own attorney began at HT 238 with redirect examination beginning on page 306. It was at this point Alternative Committee Member Campbell began to act as Chief Prosecutor. (*T. 315*). Campbell took over the proceedings asking questions and cross-examining Shoemake regarding matter he obviously considered had been omitted from the examination by Commission Attorneys. *See T. at 315.*

Newsome testified that the only way she found out about anything was when she went and

[27]McNulty's records reflect almost daily contact with Newsome.

hired Stubbs. (*T. 153)*[28] This of course was after Newsome had hired Stubbs. The home was built out of the front door of the mobile home trailer in which she was living.

Attorneys for both sides were ordered to file their proposed Findings of Facts and Conclusions of Law by April 24, 2015, and they were. *See Commission Proposed Findings, C.P. 707, and Shoemake's Proposed Findings, C.P. 740.* On May 11, 2014, the Committee, again, consisting of Alternative Commission Members Morton and Campbell, rendered their findings and recommendations, *C.P. 780.* On June 25, 2015, the Full Commission basically affirmed the findings and recommendations of Campbell and Morton with additional language that pertained to, considered and overruled Shoemake's post-hearing Motions. It has been conceived that panel member Campbell is the author of the findings.

That McNulty did not present petitions to Shoemake with the sworn signature of the Conservator Marilyn Newsome is simply not in dispute. The petitions were signed by McNulty in her capacity as attorney for the conservatorship and also subject to MRCP 11 Certifications.

SUMMARY OF THE ARGUMENT

Appellee's Point 1: The Committee, and subsequently the Commission, erred in considering any issues other than the two (2) issues identified by Alternate Committee Member Campbell at the beginning of the Hearing.

Appellee's Point 2: Appellee's testimony and that of his court administrator is uncontradicted about the circumstances surrounding Appellee's testimony at the Show Cause Hearing and the subsequent development of information regarding Appellee's testimony following that hearing. Appellee has not been impeached or shown to be untrustworthy and the testimony has not been contradicted by positive testimony and, therefore, must be taken as true.

Appellee's Point 3: With uncontradicted testimony surrounding Appellee's testimony at the Show Cause Hearing, the Commission erred in finding "clear and convincing" evidence of misconduct on the part of Appellee.

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[28] See *RE 33.* McNulty was in constant contact with Newsome.

Appellee's Point 4: Appellee was unaware the petitions had not been filed at the time McNulty submitted same for approval, but because the petitions were not filed does not render the order entered invalid. The Commission erred in concluding the lack of filing constituted an act prejudicial to the administration of justice.

Appellee's Point 5: There is no inherent conflict of interest in serving as an attorney for a conservatorship and as the guardian *ad litem* and to the extent the Commission considered such in reaching its conclusions, the Commission was in error.

Appellee's Point 6: The Commission erred in failing to comply with its administrative procedures by, among other things, (I) intentionally not serving the Newsome complaint on Appellee for one hundred sixty-eight (168) days and then setting the complaint for a show cause hearing within fourteen (14) days of service; (ii) failing to comply with discovery request prior to the date of the Show Cause Hearing; (iii) engaging in conduct that intentionally misrepresented certain matters to Appellee with the intent to deceive Appellee as to counsel's intention with respect to the complaint filed by Newsome and the extent of counsel's investigation thereof; (iv) failing to require a sworn complaint be filed by the complaining party or voting by two-thirds (2/3) vote to waive the sworn complaint and (v) considering any allegations against Appellee other than those referred by the full Commission for the filing of the formal complaint.

Appellee's Point 7: Someone released information to Stubbs or to a newspaper editor regarding the results of the handwriting expert which was ultimately included in a newspaper article. In addition, Ballard received information from employees of Stubbs which was not immediately disclosed to Appellee. This action is in violation of the rules of the Commission on confidentiality. Such action by Ballard is contrary to the rules of the Commission, done with complete disregard for the surrounding facts and settled controlling principles of the Commission and, in accordance with the cases to be cited herein, is arbitrary and capricious. As a result of the breach of the confidentiality provisions, this matter should be dismissed.

ARGUMENT

Standard of Review: The Court reviews the entire record in this matter *de novo* and may accept, reject, or modify, in whole or in part, the findings and recommendations of the Commission. "One important rule this Court has repeatedly applied is that the recommendations of the Commission are just that, recommendations, with no binding effect and that this Court conducts a *de novo* review and is the final arbiter of Commission cases and must render independent judgment." *Mississippi Commission on Judicial Performance v. Spencer,* 725 So. 2d 171 (Miss. 1998), *citing,*

Mississippi Judicial Performance Commission v. Peyton, 555 So.2d 1036, 1038 (Miss. 1990).

As to Appellee's Point 1: Pursuant to the instructions of presiding Alternate Committee Member Campbell, there were only two (2) issues for consideration by the Committee at the hearing: (I) did Appellee sign the orders identified in Count 1 of the second amended formal complaint under the circumstances that are alleged in that amended complaint; and (ii) at the time of the Appellee's testimony on November 1, 2013, at the show cause hearing concerning his signatures on those orders, did he know or should he have known that his testimony was deceptive and misleading. *T. p. 32, lines 4 -14; and p. 251, lines 23-25.*[29]

With respect to the first issue, the testimony is uncontradicted Appellee signed the orders attached to the Second Amended Formal Complaint after being presented with petitions from the attorney for the conservatorship and being fully advised as to the necessity of the orders and the orders being in the best interest of the ward.

Appellee admitted signing the orders in question by amended answer of February 14, 2014, and after the discovery of documents through the website for the Supreme Court of the State of Mississippi (the "Court") in the matter involving Chancellor Joe Dale Walker ("Chancellor Walker") and with the assistance of Appellee's court administrator, Donna Walker, after locating the Newsome folder in her office. *T."13"; see also, T., p.167, line 23 through page 168, line 13; and p. 206, lines 9-24.*

The testimony is also uncontradicted that at the time each of the orders in question were

[29] Appellee asserts the Commission was without jurisdiction to consider, reference, comment or make findings other than as to those two issues. To the extent any of Appellee's subsequent errors address issues other than those raised by the Commission same are addressed in order to clarify factual inaccuracies in the Commission's findings.

presented to Appellee, the orders were accompanied by a petition requesting the relief contained in the order or Appellee would not have signed the order. *T., p.242, lines 17-20; and p. 311, lines 2-21.* The existence of the petitions was not disclosed by counsel for the Commission to Appellee at the Show Cause Hearing. Instead, counsel deliberately misrepresented that no such petitions existed which caused Appellee to question his signature as he would never sign an order without a petition.

Appellee would also point out there is no testimony in the record that Appellee's action in signing the orders and thereby making findings of fact, reaching legal conclusions, or applying the law as he understands it is the result of fraud, corrupt motive or bad faith. "In the absence of fraud, corrupt motive or bad faith, the Commission **shall not consider allegations** against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it." RMCJP 2. (Emphasis added). The Commission repeatedly acted upon these matters as an appellant court.

As to Appellee's Point 2: Appellee's answers to questions at the Show Cause Hearing were true and correct at the time made **to the best of Appellee's belief based upon the limited information available to him at the time** and there is no evidence in the record to refute Appellee's testimony.

First, some of the findings of fact by the Committee adopted by the Commission are just absolutely wrong and a mis-characterization of facts developed at the hearing. While the Commission criticizes Appellee for allegedly not paying attention to the bids when executing the order approving the contractor, it is just as clear the Commission did not pay attention to the incorrect findings of the Committee as pointed out by Appellee in his objections to the findings; choosing instead to just rubber stamp the Committee's findings.

Consider the Findings of the Commission on page 18 (*CP 897-928*) where they refer to testimony from Appellee regarding the order to increase the contract due to stolen goods. The Commission finds Appellee testified that in order to justify the order he would have had "some kind of police report or sheriff's report or something on materials" and then would have had "something to show the ward is responsible"; **he did**. The petition presented in support of the order provided the estimate of the stolen materials (*RE 15*). See also Construction Management Agreement (*RE 16*).

The Commission completely disregards the language of the Construction Management Agreement which clearly states that "[t]he Homeowner will be liable for all charges on Contractor's accounts for and only for said home". It also states that "Homeowner will be responsible for all insurance coverage and will not hold Contractor liable". *(RE 16).*

In order to complete construction of the house, the contractor was going to have to replace the stolen materials. The cost of that material was going to be charged to the contractor's account and, since Newsome was ultimately responsible for paying that account, there was most likely not going to be enough money in the construction fund to cover the cost of the stolen materials. The construction fund had to be increased to cover the cost regardless of who was responsible for the theft.

As to the finding Newsome "testified that she witnessed employees of C.T. Construction stealing materials", Teater's affidavit attached to the petition *(RE 15)* clarifies he instructed his employees and subcontractors to pick up all tools and equipment from the job site on a daily basis to avoid any more theft. Again, a fact the Commission chose to simply ignore.

Further on page 18, the Commission goes on to state that McNulty presented a signed statement that she never discussed the order with Appellee. No such document exists. The document

relied upon by the Commission was Holiman's (withheld) report of his meetings with McNulty, which he did not record or make any notes from and created the document from his recollection. McNulty did not sign anything and it is blatant error to base a finding in this case upon a document purportedly signed by McNulty, which did not occur, and which does not exist.[30] In short, the full Commission just adopted the panels findings without verifying what was actually said.

Further, the Commission finds (*CP 913, p.17*) Appellee "signed the July 28, 2011, and August 2, 2011, orders for which no petitions exist". Again, that is simply not correct. As to the July 28th order, Exhibit 2 to the Show Cause Hearing is McNulty's e-mail with the petition for that order. The August 2nd order was needed to clarify the previous order as reflected in the e-mail of the same date and is self explanatory. See also Teater's Bid (*RE 28*). The Management Construction fee of $30,000.00 is included in the bid, P201, 3rd from last figure in column.

Further error in the analysis of Shoemake's testimony is shown by the comments in the Findings as appear at the top of page 18 (*CP 914*). The author refers to Ex."11" stating that when Shoemake was asked about this document at the Show Cause Hearing, he denied signing the order but later "recalled" at the March 12, 2015 hearing he had "referenced a provision of construction management agreement which he then recalled that McNulty had read and explained to him three (3) years earlier". The writer plainly accuses Shoemake of having memory at the hearing, that he did not disclose to the Committee earlier at the November 1, 2013 Show Cause Hearing. This analysis is wrong. It plainly ignores what Shoemake stated to Mr. Campbell at *T. 336-337*. Shoemake was not trying to change his testimony at all. He plainly stated "I don't remember having a discussion

[30]This document (although requested - *RE 11*) was the type of information in the Commission's possession that would have been useful to Shoemake in preparing his testimony. It was withheld.

with her. I don't remember where we met or how that order was entered by me and her. But according to her emails and billing statements, she presented it to me." *See T. 336 (bottom), T. 337 (L. 1-6).* It was plain error for the writer to conclude Shoemake was changing his testimony or that at the Show Cause Hearing he was trying to deceive or mislead.

Further errors in the Finding are bland. For example at *CP 925* the findings set forth in its first bullet point that Shoemake never signed an order without a petition, yet no petitions were filed in support of July 28, 2011 order referring to *RE 3*. This comment ignores Ex. 2 of Ex. 6 (*RE 38*) and the email of McNulty sending to Shoemake a petition upon which the July 28, 2011 order is based. Likewise, the claim at *CP 925* (1st bullet point) that the August 2, 2011 order was not supported by a petition, ignores that the request for the relief was set forth in paragraph 3 of the petition that accompanied the email from McNulty. *See RE 3*.

On the one hand, the Commission finds that Appellee did not engage in any concerted action to award funds from the conservatorship which Appellee knew were not justified. See Pg. 18 of 32 (*CP 194*). Then the Commission finds the mere failure to enforce Uniform Chancery Court Rules "**likely** did result in dissipation of the ward's assets". *CP 914 (Pg. 19*) (Emphasis added). First, finding that something "likely" happened does not remotely rise to the standard of clear and convincing evidence as will be addressed later.

Regardless, there is absolutely no evidence in the record whatsoever that Appellee's failure to enforce any particular Uniform Chancery Court Rule caused the dissipation of the assets of the conservatorship. In fact, there is no evidence in the record that **any act** on the part of Appellee, or McNulty for that matter, dissipated assets. The Commission admitted that Appellee signed no orders that Appellee knew were not justified.(*CP 914, p.18*) Appellee would point out that the Special

Needs Trustee, Richard Courtney, presented as a witness for the Commission filed two petitions that were not signed by Newsome and, again, no one questioned the practice of this attorney signing the documents as a fiduciary. (*RE 31 & 32*) Courtney was the Commission's Expert Witness on Chancery Court Rules.[31]

Uniform Chancery Court Rule 6.13 requires pleadings to be signed by a fiduciary. McNulty was the attorney for the Conservatorship. As attorney she was a fiduciary. McNulty was a Guardian Ad Litem. As such, a Guardian Ad Litem is also a fiduciary. The pleadings were indeed signed by a fiduciary. MRCP 11 states in part . . . . [t]he signature of an attorney constitutes a **certificate** that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information and belief there is good ground to support it; . . . . It has been repeatedly held "[a]n attorney is presumed to have the authority to speak for and bind his client."*Williams v. Homecomings Fin. Network,* 134 So. 3d 779*,* 783 *(*Miss. Ct. App. 2012); *see also,* " *Parmley v. 84 Lumber Co.*, 911 So. 2d 569 (Miss. Ct. App. 2005); *Pace v. Fin. Sec. Life of Miss*., 608 So. 2d 1135, 1138 (Miss. 1992); *Fairchild v. Gen. Motors Acceptance Corp.*, 254 Miss. 261, 265, 179 So. 2d 185, 187 (1965).

In short, the law is clear in Mississippi that attorneys can act on behalf of their clients. *Bluewater Logistics, LLC v. Williford,* 55 So.3d 177, 188 (Miss. Ct. App. 20090. Here, Appellee relied on the representations of McNulty in her petitions that there were good grounds to support the orders entered by Appellee. Appellee was fully within his right to do so.

Newsome admitted in her cross-examination that she had a lawyer, "Ms. Keely" (*HT 129*). She similarly acknowledged having signed a Construction Management Agreement (*T. 130*).

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[31]Incidentally no order appears in the Court file with regard to Courtney's petition (*RE 31*). Was it not filed or was it misplaced by the clerk? Can the Commission two years later blame the absence of this order too . . . on the Judge?

However, as attorney, McNulty legally had all the authority necessary to present the petitions and represent the Conservatorship because McNulty was the attorney. *Williams v. Homecoming Financial Networth Inc.,* 213 WL3808061 (Miss. App.); *Fairchild v. General Motors Accept. Corp.*, 179 So. 2d, 185 (Miss. 1965); *Parmley v. 84 Lumber Co.*, 911 So. 2d, 569 (Miss. App. 2005); *Pace v. Fin. Sec. Life of Miss.*, 608 So. 2d, 1135 (Miss. 1992). Attorneys' obligations are governed by MRCP Rule 11. Their signatures are certification the same are truthful and accurate. Appellee relied on McNulty as the fiduciary presenting the petition just as the others did in accepting the petitions signed only by the Special Needs Trustee. The Commission has no authority to second guess Shoemake's legal conclusions thereasto.

If the Court is going to hold that this type petition should be executed and sworn to by the conservator and not the attorney, it is respectfully argued that Appellee was applying the law as he understood it. RMCJP 2 states "[i]n the absence of fraud, corrupt motive or bad faith, the Commission shall not consider allegations against a judge for making findings of fact, reaching a legal conclusion, or **applying the law as he understands it**. (Emphasis added). If the Commission is going to be allowed to question and discipline judges based on their application of the law as they understand it, then the Commission becomes an intermediate appellate court.

The Committee and Commission continue in their appellate court action when they find that the "subject to change" language in Teater's bid should have rendered the bid unacceptable, or at least prompted some inquiry. Throughout their review of this matter, the Commission and Committee have operated under the mistaken assumption the bid laws for governmental or state construction projects are the same for private projects; nothing could be further from the truth.

There are no statutory standards imposed upon competitive bidding on private projects.

Unlike public bidding and contract award, there are no legal restrictions on the bidding and award of private projects. The owner is free to select any bid, regardless of the bid's compliance with any invitation to bid and/or negotiate with any bidder after receipt of requested competitive bids. *See: Mockbee, Mississippi Construction Law, Second Edition, pg. 10.*

In addition and contrary to the findings of the Committee that "[n]one of the other four bids included that language", three of the other bids did contain qualifiers.(*See RE 15*) For example, Solid Rock Construction, Inc.'s price contained specific allowances for fixtures and appliances, which if exceeded, would increase the cost. In addition, it did not contain pricing for the concrete driveway and other costs included in the bid of C.T. Construction which would have increased the price which already exceeded the accepted price by $51,124.85. It also included a profit/management amount of $31,194.50. The quote from Tullos Homes, LLC contained a qualifier for allowances. As for Fairoaks Construction, Inc., it too included a qualifier for allowances in its bid. This is private construction of a residence; the bids/pricing submitted was consistent with the single family market. C.T. Construction also contained pricing for compaction test, dirt work, treatment plant for sewer, driveway, sidewalks and concrete porch and patio not included in some of the other pricing.

If you accept the Committee/Commission's logic, the "original" bid of C.T. Construction should have been thrown out and the next low bid, Tullos Homes, LLC at $311,000.00, automatically accepted. This would have resulted in an immediate increase of $37,924.88 in the initial cost of construction without consideration of the qualifiers.[32] Aside from the fact that no such requirement exists in private bid projects, how would this have been in the best interest of the ward?

[32]Imagine the complaints if Shoemake had rejected the low bid.

Contrary to the findings of the Commission, the testimony relied upon by Appellee in his findings of fact and conclusions of law submitted to the Committee is uncontradicted by any reliable testimony provided by the Commission. The testimony is uncontradicted the investigator for the Commission contacted Appellee and requested that Appellee copy the court file on the "Clements Estate" alluding there was a complaint filed against Appellee on the case. *See T., p. 240, line 25, through p. 241, line 12.* It is also uncontradicted that Appellee complied with the request and produced the requested information on August 23, 2013, to then Commission Executive Director, John Toney ("Toney") and current Executive Director, Darlene Ballard ("Ballard"). *See T., p. 240, lines 9-12.*

Appellee was led to a conference room and about a minute later two (2) agents from the Department on Justice ("DOJ"), Federal Bureau of Investigation ("FBI"), entered the room and began to interrogate Appellee regarding the Conservatorship of Victoria Newsome ("Conservatorship"). *See T. , p.241, lines 7-12.*

Toney, Ballard and Holiman conspired with agents of the FBI to lure Appellee to the Commission's offices for the purpose of providing Appellee for interrogation by the FBI, misrepresented the reasons for requesting Appellee's presence and never advised Appellee on the real reasons for his attendance, thereby depriving Appellee of knowledge that might have resulted in Appellee being represented by counsel.

At the meeting of August 23, 2013, Toney, in the presence of Ballard, advised Appellee that no complaint had been filed against him related to the Conservatorship; a statement both Toney and Ballard knew to be false. In addition, Toney and Ballard advised Appellee that there was no complaint filed against him and Appellee had been an accidental or unwitting participant. *See: T. ,*

p. 211, lines 1-17. See T. , p. 240, lines 17-22. In fact, Appellee was not made aware of the Newsome complaint until a show cause order was served upon him on or about October 17, 2013, commanding Appellee to appear November 1, 2013, and show cause as to why Appellee should not be suspended pending determination of the Newsome complaint. *See: Order to Show Cause dated October 16, 2013.*

At the meeting of August 23, 2013, the FBI advised Appellee that no petitions to support the orders signed by Appellee had been filed in the Conservatorship, that he had been an accidental or unwitting participant, was instructed not to talk to McNulty or Chancellor Walker, and that Appellee was not a target and would not be charged with any wrongdoing. *See T., p. 210, line 9-25; and p. 239 line 19 through p. 240, line 8.*

Also at the meeting of August 23, 2013, Appellee advised the FBI that the signatures "do look like my signatures" but "I don't sign orders without petitions, without a basis". *See T. , p. 210, lines 18-20.*

At the time of the November 1, 2013, hearing, Appellee had been given only fourteen (14) days to prepare, provided no information other than the complaint from Newsome, had been told that Appellee had done nothing wrong. Two requests for documents were made to Ballard on October 21, 2013 and October 22, 2013 (Ex."11"). Because he had no information to refute the lack of petitions, Appellee surmised that he had not signed the orders and testified accordingly. *See T., p.210, lines 9-20.*

At the November 1, 2013 hearing into Walker's complaint, Appellee had been provided one (1) piece of paper, an e-mail of McNulty of August 1, 2011, and had no other documents from the Commission to review prior to the hearing. *See T., p. 213, lines 7-15 and Hearing Exhibit "11",*

Correspondence.

At the November 1, 2013, hearing, Appellee testified with respect to the order signed August 2, 2011, (*RE 5*) stating the signature "looks like" Appellee's signature but Appellee did not believe the signature on the order was his since he had been advised that no petitions had been filed to support the order, he does not sign orders with just a signature line on one page, the order provided for the transfer of funds which he had struck from the order approving the contractor and the e-mail threads indicated that the matter was also being sent to Chancellor Walker. *Ex."4", p. 29, line 24 through p. 41, line 1.*

The Order of March 26, 2012 (marked *Nunc Pro Tunc*)(*RE 18*) bore markings, writings and notations that were not Appellee's. *See, Ex. 10b, Response to Request for Admission No. 6.* In consideration of the foregoing undisputed, undenied and unchallenged testimony, Appellee, upon learning the attorney who prepared and presented the proposed orders was claiming her Fifth Amendment Privilege against self-incrimination, fairly and reasonably doubted the accuracy or legitimacy of the order then purportedly bearing his signature.

On August 2, 2011, McNulty furnished a series of email communications to Appellee with proposed orders. Show Cause Hearing Ex.13. (*RE 6-14*) Among the documents provided on that date, McNulty included an Order Transferring Funds Into Conservatorship Account for the Construction of Home, a two page document with writing on the second page and a signatory for "Chancellor". The documentary evidence undisputedly shows that this was transmitted to Appellee at 3:59 p.m. on August 2, 2011 (*RE 8*) with McNulty acknowledging its receipt back on August 2, 2011, at 4:33 p.m. (*RE 13*) When presented with the Order that bore only his signature at the top of the second page and prepared in different font or type styles, he reasonably and fairly questioned

whether he signed that document in view of the clean proposed Order submitted by McNulty on the same day and in the exact same language.(*RE 9*) Again, with McNulty pleading the Fifth, Appellee reasonably doubted and questioned the authenticity of the facts of the order.[33]

At the November 1, 2013, hearing, Appellee testified with respect to all of the orders presented for his review, with the exception of the order of January 25, 2012, the signatures did bear a resemblance to his signature but based on what he knew then, he would have to say the signatures were not his. *Ex."4", p.77, lines 5 - 7 and line 24 through p. 78, line 14.*

Appellee also testified he would accept matters *ex parte* if there was a proper petition, there was no argument, the petition was signed by the fiduciary and if he had evidence of a need for the order. *Ex."4", p. 73, lines 19 - 24.*

Further, Appellee testified that McNulty, as attorney for the Conservatorship and as Guardian *ad litem*, was a fiduciary and could sign the petitions subject to M.R.C.P. 11. *See: T., p.302, line 4 through p. 304, line 4; and p. 318, lines 12-17.*

The testimony is uncontradicted that it was not until after the November 1, 2013, hearing that Appellee's court administrator was able to locate papers that clarified and refreshed Appellee's memory. *See: T., p. 355, line 15 through p. 366, line 3.* It is also uncontradicted that Appellee, as a result of the misrepresentations of Toney, Ballard and the FBI, did not learn of the existence of the petitions until after the November 1, 2013, hearing. *See: T., p. 198, line 19 through p.199, line 2; and p. 206, lines 14-24; and p. 213, lines 7-10.*

Throughout the course of the proceeding, there were comments and testimony addressing

[33] Because McNulty was claiming the Fifth Amendment and she is the one who prepared and presented the orders, Appellee fairly and reasonably doubted the genuineness of his signature on some of the orders.

the correcting of the bid price. Incorrect references were made to the Walker and Teater pleading of guilty for bid rigging but, as will be addressed later, there is no such thing as bid rigging on private projects. No one pled guilty to bid rigging. *See: Chad Teater Plea to Obstruction of Justice, U.S.D.C. for the Southern District of Mississippi, Northern Division, Criminal NO. 3:14cr108 DCB-FKB, and Joe Dale Walker Plea to Obstruction of Justice, Criminal Cause No. 3:14cr93 DFJ-FKB.*

None of the referenced testimony is contradicted by any witness provided by the Commission. Nor is Appellee's testimony not inherently improbable, incredible, or unreasonable. Without positive testimony contradicting that offered by Appellee, the Commission should have found in favor of Appellee.

> Evidence which is not contradicted by positive testimony or circumstances and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously, discredited, disregarded or rejected, even though the witness is a party or interested; and unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact. (Emphasis added). *Dunn v. Dunn,* 911 So. 2d 591 (Miss. App. 2005).
>
> The testimony of a witness which is uncontradicted, and who is not impeached in some manner known to law, where he is not contradicted by the circumstances, **must be accepted as true**. (Emphasis added). *State Farm Auto Ins. Companies v. Davis,* 887 So. 2d 192 (Miss. App. 2004).
>
> In the absence of contradictory evidence, courts are bound to accept the only credible evidence offered in a proceeding and apply correct law. *Mississippi State University v. People for Ethical Treatment of Animals, Inc.,* 992 So. 2d 595, *rehearing denied* (Miss. 2008).

Appellee's testimony is not inherently improbable, incredible, or unreasonable. He fully explained his testimony at the Show Cause Hearing and fully addressed all issues raised at final hearing. Appellee's testimony is uncontradicted and must be taken as true.

Appellee's Point 3: A finding of misconduct on the part of Appellee must be determined by

clear and convincing evidence: a lofty standard:

> "Clear and convincing evidence" is defined as follows: that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, **evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy,** of the truth of the precise facts of the case. (Emphasis added). *Moore v. Bailey*, 46 So. 3d 375, *rehearing denied, certiorari denied,* 49 So. 3d 636 (Miss. 2010).
>
> Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same standard. *Roberts v. Roberts,* 110 So. 3d 820 (Miss. 2013).

To bolster its finding that Shoemake did not limit or restrict his testimony as to whether he could not recall signing documents, or that his testimony was not based upon what he knew on the day of the Show Cause Hearing, the Commission at multiple points stated, "He did not say that he was unsure, or that he could not recall signing" (*CP 925*). That Shoemake could have, but did not answer with responses such as "I do not know" or "I am not sure". (*CP 927)*[34] These repeated assertions simply ignore what Shoemake did say with regard to signing the orders namely:

"I can't remember that detail that far back . . . I can't say for certainty that on the date I signed that order I knew that." (*Ex. "4", p. 14*)

"But for me to tell you the - - some two-plus years after the exact signing, I can't tell you everything that transpired."

"I don't recall from back then." (*Ex. "4", p. 28*)

In response to the questions about how his signature may have been obtained upon an order that was filed without a petition, Shoemake plainly stated "No ma'am I don't have a satisfactory explanation. I can't - - I can't figure it out and I can't name names or point fingers. But somehow

[34] Accordingly, these responses would have been acceptable testimony on behalf of Shoemake, and not deceitful or misleading.

or another somebody put my signature on an order without presenting that order to me." "I don't do business that way. I just do not do business that way as a judge." (*Ex. "4", p. 45, see also p. 50*).

"But the other orders do have a resemblance to my signature." (*Ex. "4", p. 51*)

"I'll say no, it's not my signature. It looks like my signature. But I don't think it is my signature. I think it's been transposed or cut and pasted or something." (*Ex. "4", p. 30 referring to RE 5*, brought to the hearing by Shoemake himself).

With two weeks to prepare for the Show Cause Hearing, Shoemake stated in further response to whether or not he had signed the involved orders he plainly stated "With what I know now I've got to say those aren't my signatures." (*Ex. "4", p. 52)*

According to the Commission findings, had Shoemake used words such as "I do not know" or "I am not sure" or had he simply remarked that he was unsure or could not recall signing, his testimony would not have been deceptive or misleading. The findings ignore the fact Shoemake was questioned as if petitions had not been presented to him regarding orders. Shoemake repeatedly stated he does not do business that way.

Against this backdrop, the *Findings* of the Commission do not even mention or refer to the fact the lawyer who prepared and presented the orders to Shoemake was claiming her Fifth Amendment Privilege against self-incrimination regarding her involvement with the orders.

There is no evidence to the contrary in the record. Under the definition of clear and convincing evidence, the only determination that can be made "without hesitancy" is Appellee did not know nor could he have known that the testimony he was giving at the Show Cause Hearing was not accurate. Commission counsel has produced no evidence to the contrary and certainly has not met the high standard of clear and convincing evidence to justify such a ruling.

As to Appellee's Point 4: McNulty obtained approval for every expenditure by **prior court order** and submitted petitions for each order signed by Appellee. The testimony confirms Appellee was unaware the petitions had not been filed at the time they were submitted. Notwithstanding, if petitions were not "filed" before the order was executed, it is not defective to the administration of the Conservatorship nor does it constitute an act prejudicial to the administration of justice. If one can have unapproved expenditures ratified by the court as in the *Melson* case below, petitions supporting the order "filed" after execution of the order are certainly ratified. *See: United States Fidelity & Guaranty Company v. Conservatorship of Iris Althea Melson, et al.,* 809 So. 2d 647, 659 (Miss. 2002):

> Ordinarily, where a court order is obtained authorizing particular expenditures the guardian is protected, and the expenditures cannot be questioned, except for fraud, in the settlement of the guardian's final account. **As a general rule, a prior authorization by the court is not necessary, since the court may, by allowing the credit or otherwise, approve or ratify a previously unauthorized expenditure.** Obviously, however, a guardian who proceeds with the management of the estate and makes expenditures without a previous court order faces the hazard that the court afterward may not ratify or approve such acts. (Emphasis added). *See also: Williams v. Duckett (In Re Duckett)*, 991 So.2d 1165, 1175 (Miss 2008).

Certainly the better practice is to file the petition and seek the order. However, the petitions were not contested, the orders were absolutely necessary to the construction of the home in question and failing to get the orders entered would have worked to the detriment of the Ward.

As to Appellee's Point 5: Commission counsel questioned Appellee regarding alleged conflicts of interest in McNulty serving as attorney for the Conservatorship and the guardian *ad litem*. **Appellee had absolutely no involvement in the appointment of McNulty as either, nor with the decision to build the home or its design.** Reiterating, this was Walker's conservatorship case and Appellee's sole involvement was related to matters involving construction of the home.

Notwithstanding, there is no inherent conflict of interest in serving as an attorney for a conservatorship and as the guardian *ad litem*. The duty of the guardian *ad litem* and conservator are the same; protection of the ward's interests. The duty is not to the conservator but to the ward.

> . . . . the distinguishing feature of a conservatorship from a guardianship lies in part in the lack of necessity of an incompetency determination of the existence of a legal disability for its initiation. **After establishment of such protective procedures, the duties, responsibilities and powers of a guardian or conservator are the same**. (Emphasis present).*Miss. Code Ann.* §93-13-259; *See also:* 51 Miss. L. J. 239, 236 (1980). *United States Fidelity & Guaranty Company v. Conservatorship of Iris Althea Melson, et al.,* 809 So. 2d 647, 651 (Miss. 2002).

As to Appellee's Point 6: The Commission failed to comply with various aspects of its Administrative Procedures and all proceedings arising from that failure deprived the Commission of jurisdiction to hear this proceeding.

The record is uncontradicted that a complaint against Appellee was filed with the Commission on May 2, 2013, by Marilyn Newsome ("Newsome") through Terrell Stubbs ("Stubbs") and the complaint (*RE 25*) filed by Newsome was not served upon Appellee within ninety (90) days as required by RMCJP 5(c).

On two occasions, counsel for the Commission was allowed to file amended formal complaints. The matter went to hearing on the Second Amended Formal Complaint. While the Committee may have had jurisdiction to rule on procedural and discovery matters, it did not have the jurisdiction to allow the amending of the formal complaint. Pursuant to the *Administrative Procedures of the Commission*, (*RE 37*) if the **Commission determines** there is probable cause for a formal hearing, **the Commission will issue** a formal complaint. (Emphasis added).

Thus, only the Commission can direct the filing of a formal complaint. Once that is accomplished, only the Commission can authorize the amendment of that formal complaint. There

is absolutely no provision in the Administrative Procedures of the Commission that allow anything less than the Commission to authorize a formal complaint and no subset of the Commission should be allowed to unilaterally alter the **full Commission's determinations** by allowing completely different subject matter amendments.

Finally, the Commission never required a sworn complaint from the original complaining party, Newsome/Stubbs. RMCJP 5 (*RE 35*) provides in part as follows:

> **D. Sworn Complaint or Statement in Lieu of Complaint.** If the initial complaint is not dismissed, the complainant shall be asked to file a detailed, signed, sworn complaint against the judge. The sworn complaint shall state the names and addresses of the complainant and the judge, the facts constituting the alleged misconduct, and, so far as is known, whether the same or a similar complaint by the complainant against the judge has ever been made to the Commission. A sworn complaint may be waived by a two-thirds (2/3) vote of the Commission; a sworn complaint shall not be required in an inquiry initiated by the Commission on its own motion.

Included in the discovery received on August 29, 2014, (*Ex. "1"*) was the *Administrative Procedures of the Commission*, specifically the internal procedures adopted by the Commission that conform to the requirements of RMCJP 5. It sets out the procedure for complaints and explains it is a step-by-step process. *See RE 37.*

In particular it provides that following the Commission's meeting, a list of the investigative actions ordered by the Commission is compiled. **This practice ensures the 90 day requirement for notification of judges is adhered to.** In addition, if the initial complaint is not dismissed, the complainant **shall** be asked to file a sworn complaint against the judge or provide a Statement in Lieu of Complaint. The Sworn Complaint shall state the names and addresses of the complainant and the judge, the facts constituting the alleged misconduct, and, to the degree known, whether the same or a similar complaint by the Complainant has ever been made to the Commission. (Emphasis

added). If the Commission does not receive the Sworn Complaint or Statement in Lieu of Complaint, the Commission may waive the Sworn Complaint by a two-thirds (2/3) vote. *See RE 37. See RE 36 for the Commission Minutes.* They are however as follows:

> Minutes of Commission meeting of June 14, 2013: NEW COMPLAINTS, No. 2013-083: Judge Midcalf moved the Commission consider this complaint pending further investigation. Judge Clark seconded and the motion passed unanimously.
>
> Minutes of Commission meeting of October 11, 2013: PENDING COMPLAINTS, No. 2013-083: Judge Clark moved that the Commission find probable cause to file a Formal Complaint **in this Inquiry**. Judge Midcalf seconded and the motion passed unanimously. Judge Clark then moved that a Show Cause Hearing be scheduled for interim suspension. Judge Morton seconded and the motion carried unanimously. (Emphasis added).

There were no minutes of the Commission provided in discovery where the Commission waived the Sworn Complaint or Statement in Lieu of Complaint by a two-thirds (2/3) vote, as required. If an inquiry was initiated by the Commission on its own motion, that would relieve them from the necessity of filing a sworn complaint. No such motion is in the minutes provided. The Commission did not follow its own procedures and allowed amendment for an entirely unrelated matter by motion of staff attorney. (*CP 389-390*). All proceedings in this matter were arbitrary and capricious and, therefore, should be dismissed.

It is well settled that an agency's failure to comply with its rules is arbitrary and capricious:

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,--absolute in power, tyrannical, despotic, non-rational,--implying either a lack of understanding of or a disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles. . . . *McGowan*, 604 So. 2d at 322 (citations omitted). *See also: Elec. Data Sys. Corp. v. Miss. Div.*

> *of Medicaid*, 853 So. 2d 1192, 1205 (Miss. 2003); *Marquez*, 774 So. 2d at 430 ("If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary or capricious."); *Miss. State Dep't of Health v. Natchez Cmty. Hosp*., 743 So. 2d 973, 977 (Miss. 1999) (defining arbitrary as: "An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on will alone.") and (defining capricious as: "An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles."). *Hill Bros. Constr. & Eng'g Co. v. Miss. Trans.Comm'n,* 909 So. 2d 58 (Miss. 2005).
>
> . . . . **the failure of an agency to abide by its rules is per se arbitrary and capricious** as is the failure of an administrative body to conform to prior procedure without adequate explanation for the change. (Emphasis added).
>
> *Lowe v. Lowndes County Bldg. Inspection Dept.* 760 So. 2d 711 (Miss. App. 2000).

It is acknowledged that this Court has determined the investigative, prosecutorial and adjudicative functions in the Commission do not violate due process. *Mississippi Commission on Judicial performance v. Russell* 691 So. 2d 935, 945-947 (Miss. 1997). That is not the argument. While the processes themselves may not violate due process if carried out correctly, it is the intentional failure to not abide by the processes or follow your own rules, that creates the due process violation.

From Appellee's uncontradicted testimony and evidence, it is clear that had Commission counsel disclosed to Appellee the existence of the information in their possession at the time of the Show Cause Hearing, Appellee could have reviewed that information, researched his records, obtained information on his own to refresh his memory as to the events in question and would have certainly testified differently. Instead, counsel embarked on a course of deceit and misrepresentation deliberately designed to lead Appellee down a different path. To say the actions of counsel in denying the request for information prior to the Show Cause Hearing and stating repeatedly that no

petitions existed to support the orders, did not influence Appellee's testimony at the hearing simply defies logic. These actions not only denied Appellee due process, the actions are directly responsible for where this case stands today. Shoemake did not try nor intend to mislead the Commission. It was the Commission that misled him.

As to Appellee's Point 7: For breaches of confidentiality Shoemake filed two motions to dismiss. The first (styled Respondent's Second Motion to Dismiss) is found in Clerks Papers beginning *CP 67.* He points out that the intimate workings of the Commission were made known to someone at the Magee Courier/Simpson County News with accompanied copies of the publication and editorial language concerning this matter then before the Commission (*CP 67-72*). Shoemake argued that it was not probable the leaked information did not come from within the offices of the Commission.

On April 15, 2014, Shoemake filed his Amended Second Motion to Dismiss setting forth that in answers to interrogatories Ballard admitted "However, in an effort to answer there may have been some telephone calls between the Commission and Stubbs regarding the need for his client, Ms. Newsome, to come to testify or regarding the status of the pending case." (*CP 224*) Request was further made for dismissal based upon the refusal of Newsome to answer questions at her deposition. In response to requests for production of documents, on April 29, 2014, the Commission produced Ex. "1", and within those 1377 pages was *RE 30. Using adobe it is page 397.* This document dated November 13, 2013, from the Law Office of Terrell Stubbs was furnishing samples of Shoemake's signature to Ballard even before the full Commission Findings from the Show Cause Hearing were filed on November 19, 2013. (*CP 49*) How did Stubbs office learn of the testimony of Shoemake at the Show Cause Hearing to make this offer of help? Shoemake argued in his motion that these

proceedings were tainted and that the Rules of the Commission had been violated to his disadvantage by the leak of information to the only newspaper in the hometown of the only lawyer he has sanctioned (Stubbs), at a time when he was seeking re-election. It is submitted that dismissal of this matter would be an appropriate remedy, fashioned by this Court as these events and breaches of confidentiality cannot simply be ignored as having no impact upon the judiciary of the state as it pertains to the mission of the Mississippi Commission on Judicial Performance. The elected judges of this state deserve as matter of respect, this issue be addressed.

CONCLUSION

In attempting to prove Shoemake negligently permitted the filing of petitions and did not require McNulty to follow the Rules, the Commission's witness, Richard Courtney, Esq. ("Courtney") was allowed to testify as an *expert* to explain the Chancery Court Rules. However Courtney had to admit that as a fiduciary (Trustee of the Trust) he too, had filed pleadings and petitions without the signature of Newsome, something plainly allowed by U.C.C.R. 6.13. *See Courtney's Petitions* (*RE 31, 32*). Courtney, just like McNulty, had prepared and filed petitions as a fiduciary. Despite denying she had ever asked for the construction of the home, Newsome plainly did so before Judge Joe Dale Walker on January 12, 2011. *See Ex."8", p. 50, and her hearing testimony T. 131-132* . Unfortunately, Commission attorneys either did not know or let this witness perjure herself anyway. (*T. 139-142*) Newsome plainly had requested a home be built. In addition Newsome plainly admitted signing the Construction Management Agreement which bears her signature (*RE 16*). The testimony of Courtney and Newsome do not change the fact that Shoemake did not order the construction of the home and claims that had the rules been followed differently,

the home would not have been constructed are speculative at best, and would be based upon testimony that is untrue.

The elected judges of this state deserve better. It is not the responsibility of the Commission to convict but to find the truth. The truth is not obtained by misleading and deceiving elected judges, or withholding information from them, violating the Commissions own rules, and waiting to see if an unwitting judge may misstep. The Commission's repetitious reliance upon one quote by Shoemake at his Show Cause Hearing that he had never in his life signed a second page with just a signature blank, ignores the undisputed fact that it was Shoemake who brought this order and the supporting email chain with him to the Show Cause Hearing. The Commission has not explained and it cannot explain how his denial on the date of the Show Cause Hearing regarding this order somehow advanced any attempt to deceive or mislead lawyers and judges. The Commission Findings never mentioned the fact that the attorney who prepared and presented the orders intended, and did claim her right against self-incrimination at the Show Cause Hearing with regard to her involvement and presentation of these orders. The Commission has refused to mention or acknowledge that the email thread and time line that accompanied the Order from McNulty made it highly improbable for anyone, particularly Shoemake, to conclude that he had approved that order at the time McNulty acknowledged receipt.

It is likewise unsettling that any state agency or commission, as here, can refuse to comply with its own rules regarding notice to judges and actually mislead a judge as to whether or not a complaint has been filed against him, maintain that the orders involved as here were not supported by petitions when they were, and intentionally withhold documents, refusing to recognize any

discovery obligation critical to Shoemake to defend himself. This is particularly true because Ballard knew that Shoemake had told her he had no independent recollection of signing the orders.

This Commission refused to comply with its own rules regarding the filing of charges against a judge. Here, new charges totally unrelated to the initial complaint were approved by a two member panel who claimed they were the ones misled at the Show Cause Hearing. They approved the amendment without presenting such amendment to the full Commission and then sat in their own judgment of Shoemake. The unfairness of this scenario is deafening.

According to the Commission Findings, Shoemake did not say he was unsure or he could not remember; that Shoemake did not say "I do not know" or "I am not sure" to limit or restrict is testimony. That implicitly, had Shoemake made similar reservations or comments in his testimony, he would not have been considered misleading or deceitful. It is misleading and untrue to maintain Shoemake did not say such (similar) things.

There has been absolutely no showing of ill will, personal gain, or improper abuse of power by Shoemake. All he did was facilitate the construction of a home. The Commission here acted as if it was a mini-FBI agency, abandoning its own purpose and being unable to prove any misconduct, simply played "gotcha" with Shoemake, trying to exploit his testimony by claims that he attempted to mislead or that he was deceptive. This is done by simply ignoring what Shoemake did say.

The Findings of the Commission should be rejected and this matter should be dismissed.

This the 30th day of July, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William H. Jones, do hereby certify that I have this day filed electronically with the Mississippi Supreme Court of Appeals using the MEC system which sent notification unto Darlene Ballard, Esq., and Bonnie Menapace, Esq., and which I have mailed by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellee/Respondent unto Darlene Ballard, Esq., and Bonnie Menapace, Esq., Mississippi Commission on Judicial Performance, 660 North Street, Ste. 104, Jackson, Mississippi 39202.

This the 30th day of July, 2015.

/s/William H. Jones
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